

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JAMES GILLIAM, Individually And On Behalf Of
All Others Similarly Situated,

Plaintiff,

vs.

FIDELITY MANAGEMENT AND RESEARCH
COMPANY, et al.,

Defendants.

Civil Action No. 04cv11600 (NG)

BOGATIN FAMILY TRUST, Individually And On
Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

FIDELITY MANAGEMENT AND RESEARCH
COMPANY, et al.,

Defendants.

Civil Action No. 04cv11642 (NG)

CYNTHIA A. BENNETT and GUY E. MILLER,

Plaintiffs,

vs.

FIDELITY MANAGEMENT AND RESEARCH
COMPANY, et al.,

Defendants.

Civil Action No. 04cv11651 (MLW)

[Caption continues on next page]

**MOTION TO STRIKE THE INDEPENDENT TRUSTEE DEFENDANTS'
SUBMISSION IN SUPPORT OF FIDELITY DEFENDANTS' MOTION FOR
CONSOLIDATION AND SEVERANCE OF CLAIMS**

GHASSAN J. AWALI et al., Individually And On
Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

FIDELITY MANAGEMENT AND RESEARCH
COMPANY, et al.,

Defendants.

Civil Action No. 04cv11709 (MLW)

WILLIAM S. GROESCHEL, Individually And On
Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

FIDELITY MANAGEMENT AND RESEARCH
COMPANY, et al.,

Defendants.

Civil Action No. 04cv11735 (GAO)

NANCY HAUGEN, MICHAEL F. MAGNAN,
KAREN L. MAGNAN, ROSE M. IANNACCONE,
PRESLEY C. PHILLIPS, ANDREA M. PHILLIPS,
and CINDY SCHURGIN, for the use and benefit of
FIDELITY MAGELLAN AND FIDELITY
CONTRAFUND,

Plaintiffs,

vs.

FIDELITY MANAGEMENT AND RESEARCH
COMPANY, et al.,

Defendants.

Civil Action No. 04cv11756 (MLW)

[Caption continues on next page]

DAVID O. FALLERT, Individually And On Behalf)	
Of All Others Similarly Situated,)	
)	
Plaintiff,)	
)	Civil Action No. 04cv11812 (MLW)
vs.)	
)	
FIDELITY MANAGEMENT AND RESEARCH)	
COMPANY, et al.,)	
)	
Defendants.)	

Plaintiffs James Gilliam, Bogatin Family Trust, William S. Groeschel, Ghassan J. Awali, Marina Berti, Valeriex A. Daspit, Arthur G. Denker, Randall C. Heyward, Stanley H. Krupa, Nicole Lenzi, David M. Lucoff, Joseph F. Martingano, Michael S. Mendolia, Patricia K. Munshaw, Brian D. Reese, Jay J. Rupp, Gilbert P. Travis, Jewel R. Travis and David O. Fallert (the “*Gilliam* Plaintiffs”) hereby move to strike the Independent Trustee Defendants’ Submission in Support of Fidelity Defendants’ Motion for Consolidation and Severance of Claims.¹

The Independent Trustee Defendants cite no authority that allows them to slice up the *Gilliam* Plaintiffs’ complaint and redistribute the claims to various judges of their own choosing. The Independent Trustee Defendants do not even cite the rule of federal procedure under which they are proceeding.² The submission, made without any legal basis, should be stricken.

Moreover, the Independent Trustee Defendants’ submission in support of the Fidelity Defendants’ consolidation and severance of claims is just another (belated) response to the

¹ The Fidelity Defendants filed their motion on December 22, 2004. By moving to strike the Independent Trustee Defendants’ submission, the *Gilliam* Plaintiffs do not waive any right to respond to the substantive issues raised in the submission.

² To the extent the Independent Trustee Defendants may rely on Rule 21 of the Federal Rules of Civil Procedure as authority for their submission, they are mistaken. Rule 21 governs improper joinder of parties and allows for a party who claims improper joinder to sever claims and litigate them in a separate proceeding. This is not the case here nor do Defendants claim it is.

Gilliam Plaintiffs’ motion for consolidation of the seven pending excessive fee cases in this jurisdiction (the “*Gilliam* Consolidation Motion”). That motion has been fully briefed and is pending before the Court. A decision on the *Gilliam* Consolidation Motion will render Defendants’ instant submission moot and it therefore should be stricken as it threatens to waste judicial resources and produce inconsistent adjudications. In fact, all of the arguments that Defendants now raise should have been made when they filed their opposition to the *Gilliam* Consolidation Motion during the regular briefing cycle. As there is a fully briefed consolidation motion pending, Defendants’ new arguments on the structure of these cases come too late and should be stricken.³

CONCLUSION

For the reasons detailed herein, Plaintiffs respectfully request this Court to strike the Independent Trustee Defendants’ Submission in Support of Fidelity Defendants’ Motion for

³ Although the *Gilliam* Plaintiffs do not respond to this improper and duplicative submission on the merits, it must be noted that by arguing that claims in the *Gilliam* cases should be transferred to Judge Wolfe and consolidated with the *Bennett* and *Haugen* actions, the Independent Trustee Defendants implicitly concede that there are related claims in the seven actions. Defendants’ instant submission therefore fully *supports* the arguments by the *Gilliam* Plaintiffs that these seven excessive fee cases should be consolidated. Nevertheless, the Independent Trustee Defendants’ submission attempting, for their own advantage, to maneuver claims into two separate proceedings should be stricken.

Consolidation and Severance of Claims or, in the alternative, grant the *Gilliam* Plaintiffs 14 days to respond to the submission on the merits.

Dated: January 13, 2005

MOULTON & GANS, P.C.

By: /s/ Nancy Freeman Gans
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Patricia K. Munshaw, Brian D. Reese, Jay J.
Rupp, Gilbert P. Travis, Jewel R. Travis and David
O. Fallert*

LOCAL RULE 7.1(A) (2) CERTIFICATE

I, Nancy Freeman Gans, hereby certify that on January 13, 2005, I spoke by telephone with the John Kiernan, Esquire, of Debevoise & Plympton, counsel for the Independent Trustee Defendants, regarding the Motion to Strike the Independent Trustee Defendants' Submission in Support of Fidelity Defendants' Motion for Consolidation and Severance of Claims, who opposes the motion.

/s/ Nancy Freeman Gans
Nancy Freeman Gans

CERTIFICATE OF SERVICE

I, Nancy Freeman Gans, hereby certify that I served a copy of the foregoing document upon counsel for all parties by facsimile this 13th day of January, 2005.

/s/ Nancy Freeman Gans
Nancy Freeman Gans